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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ZASER AND LONGSTON, INC.)
(JOHN AND JOANNE HUMBERT),)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 78-250

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER being an appeal from the cancellation of a portion of
Ground Water Permit No. G3-21892P (QB-174A); having come on regularly
for formal hearing before the Pollution Control Hearings Board on the 13th
day of March, 1979, at Seattle, Washington; and appellant, Zaser and
Longston, Inc., appearing through its attorney, Larry Tracy, and respondent
Department of Ecology, appearing through its attorney, Robert E. Mack,
Assistant Attorney General, and Board members present at the hearing
being Dave J. Mooney, Chairman, Chris Smith and David Akana, and the
Board having considered the sworn testimony, exhibits, records and files

DA/LB

1 herein and arguments of counsel and having entered on the 6th day of
2 April, 1979, its Proposed Findings of Fact, Conclusions of Law and
3 Order, and the Board having served said proposed Findings, Conclusions
4 of Law and Order upon all parties herein by certified mail, return receipt
5 requested and twenty days having elapsed from said service, and

6 The Board having received exceptions and replies thereto and having
7 considered the exceptions and replies, the Board concludes that the
8 exceptions should be denied. With regard to the issue raised by
9 appellant as to the requirement of a second show cause letter, it is
10 noted that the Board reviews the respondent's decision de novo. Even
11 if appellant is correct as to the necessity of a second show cause
12 letter for the unamended permit, the substantive result would be
13 the same.

14 The Board being fully advised in the premises, now therefore,

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
16 Findings of Fact, Conclusions of Law and Order dated the 6th day of
17 April, 1979, and incorporated by reference herein and attached hereto
18 as Exhibit A, are adopted and hereby entered as the Board's Final
19 Findings of Fact, Conclusions of Law and Order herein

20 DONE at Lacey, Washington this 29th day of May, 1979

21 POLLUTION CONTROL HEARINGS BOARD

22 Dave J. Mooney
23 DAVE J. MOONEY, Chairman

24 David Akana
25 DAVID AKANA, Member

26 Chris Smith
27 CHRIS SMITH, Member

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I mailed, postage prepaid, copies of the foregoing document on the 2nd day of May, 1979, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

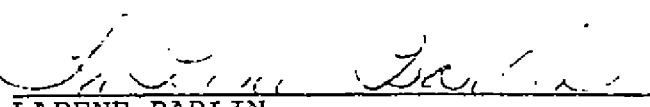
Mr. Larry Tracy
Attorney at Law
P. O. Drawer 610
Moses Lake, Washington 98837

Mr. Robert E. Mack
Assistant Attorney General
Department of Ecology
St. Martin's College
Olympia, Washington 98504

Lloyd Taylor
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Mr. Greg D. Zaser
Zaser and Longston, Inc.
2939-4th Avenue South
Seattle, Washington 98134

John and Joanne Humbert
2939-4th Avenue South
Seattle, Washington 98134


LARENE BARLIN
POLLUTION CONTROL HEARINGS BOARD

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ZASER AND LONGSTON, INC.
(JOHN AND JOANNE HUMBERT),

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 78-250

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the cancellation of a portion of Ground Water Permit No. G3-21892P (QB-174A), came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David Akana (presiding) at a formal hearing in Seattle, Washington on March 13, 1979.

Appellant was represented by its attorney, Larry Tracy; respondent was represented by Robert L. Mack, Assistant Attorney General.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution

Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Zaser and Longston, Inc. (hereinafter "appellant") is the agent of John and Joanne Humbert, who are the holders of Ground Water Permit No. G3-21892P (QB-174A). The permit authorizes the withdrawal of artificially stored ground water in the Quincy Ground Water Subarea from two wells located within the E 1/2 of Section 1, T. 18 N., R. 26 E in Grant County, Washington and application of water upon portions of the N 1/2 of the same Section 1.

II

The permit, issued in March of 1975, included a development schedule which indicated that the complete application of water was to be made by March 11, 1978. Additionally, the permit contained the following provisions:

"10. This permit is subject to termination or modification, through issuance of supplemental orders of the Department of Ecology, for good cause, including but not limited to:

- a. Violation of a permit condition;
- b. Obtaining a permit by misrepresentation or failure to fully disclose all relevant facts; and
- c. The receipt of new facts or information that dictate that termination or modification of this permit is necessary to comply with the objectives of chapter 173-134 WAC.

11. The permittee shall apply the water to beneficial use hereunder within three years from the date of this permit or the same shall automatically terminate and be of no further force and effect.

FINDINGS OF FACT,
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AND ORDER

1 The Humbert s accepted the permit as conditioned.

2 III

3 Drilling of two wells authorized in the permit for Section 1
4 was commenced prior to issuance of the permit in March of 1975. One
5 well, located in the NE 1/4 and completed in 1975, produced about
6 2000 gallons per minute (gpm) of water which amount is 400 gpm less
7 than the permit allowed. A second well, located in the SE 1/4 and
8 completed in 1976, did not produce sufficient water for irrigation.

9 IV

10 In 1975 appellant installed a circular irrigation system on each
11 of three quarter sections in Section 1: NW 1/4, NE 1/4 and SE 1/4.
12 The NW 1/4 section was rough-levelled during the same year and a pipeline
13 was installed from the well in the NE 1/4 section to the pivot of
14 the irrigation circle in the NW 1/4 section.

15 V

16 In the spring of 1976 appellant's lessees commenced soil
17 preparation on the N 1/2 of Section 1 and chisel-plowed, i.e., rough-
18 levelled the land but leaving some natural vegetation, the NW 1/4
19 section. At this time, both circles on the N 1/2 of Section 1 were
20 operable and water was applied to the NW 1/4 but not upon or for any
21 crops. Because the well in the NE 1/4 section could not supply the
22 water required to grow appellant's choice of crop, that is, potatoes,
23 over the entire N 1/2 of Section 1, appellant did not farm the NW 1/4
24 and instead diverted water to its SE 1/4 holdings, which is smaller
25 in acreage than the NW 1/4. Crops were raised on the NE 1/4 and
26 SE 1/4 section in 1976. The NW 1/4 section was not further developed

27 FINDINGS OF FACT,

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1 at that time.

2 VI

3 In 1977, appellant drilled a well in the SW corner of the SE 1/4
4 section. Water sufficient for irrigation could not be found. Appellant
5 thereafter drilled for water in the NW 1/4, taking up its efforts where
6 it had left off in 1974 and 1976. Water sufficient for irrigation was
7 discovered after July of 1978 and the well tested in September of 1978.

8 VII

9 On March 13, 1978, respondent issued a letter notifying the
10 permittees that their permit would be cancelled unless, within sixty
11 days, good cause was shown why the permit should not be cancelled.
12 Appellant responded on May 12 indicating that a circle was installed
13 on each 1/4 section of the N 1/2 but there was not enough water
14 for both circles. Appellant requested an extension of time "to get
15 a well driller to deepen the well to obtain enough water to irrigate
16 the circle on the NW 1/4." By letter dated June 2, 1978, the
17 Department's division supervisor, after finding that work had been
18 prosecuted diligently, authorized permittees an extension to
19 October 1, 1978 "to complete your project and put the water to
20 full beneficial use." Appellant did not do further work on the
21 NW 1/4 portion of Section 1 pursuant to the permit until after
22 receipt of the letter.

23 VIII

24 In the latter part of July, appellant found a well driller
25 who drilled a well in the NW 1/4 section. Water was found and in
26 September the well was tested at 2400 gpm. The evidence does not

27 FINDINGS OF FACT,
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show that appellant was possessed of a permit for a well in the NW 1/4 section. On September 27 appellant mailed an application for a change of water right of permit QB 174A to respondent showing the additional well in the NW 1/4 section.

IX

On September 28 appellant's request for an extension of the October 1 deadline was denied by letter. Therein, respondent first wrote the words "growing crops" in connection with beneficial use. Thereafter, appellant tried to get water from the NE 1/4 well to the NW 1/4 section irrigation circle. Parts were missing from the circle and the wiring was not servicable. Although the equipment was substantially repaired, the ground was "still in sagebrush" when the Department inspected the site on October 2, and no crop was visibly planted or growing.

X

On October 10 appellant's application for change in water right was returned. On that same day, an order was issued cancelling that portion of permit QB 174A relating to the NW 1/4 of Section 1. No letter to show cause why the permit should not be cancelled was sent to appellant after June 2 and before October 10, 1978. The order of cancellation was appealed to this Board. In its appeal, appellant requested more time so that respondent could process its application for change of water right to add a new well in the NW 1/4 section in permit QB 174A.

XI

Respondent is of the opinion that crops could have been grown

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

1 on the NW 1/4 section prior to October 1 and suggests alfalfa as such
2 a crop. Appellant is of the opinion that crops such as potatoes
3 (appellant's first crop choice) and cover crops are planted in the
4 spring; to plant such crops in the fall, it believes, would be a
5 waste of about \$7,200 in planting costs.

6 Appellant did not remove the natural cover on the NW 1/4 section
7 because water was not available in the amount needed for its
8 choice of crops; land so uncovered without application of water,
9 is susceptible to wind erosion. °

10 XII

11 Appellant has spent substantial sums of money to develop the
12 property in Section 1. About \$82,000 was spent on the NW 1/4
13 section, including well drilling, well testing, electrical work,
14 piping and trenching, levelling, repairs, and an irrigation circle.
15 Of this amount, appellant spent \$20,000 during the period of
16 June 2 to October 1 for a well driller (\$7,400) well test (\$2,400),
17 and repairs.

18 XIII

19 Any Conclusion of Law which should be deemed a Finding of Fact
20 is hereby adopted as such.

21 From these Findings, the Pollution Control Hearings Board
22 comes to these

23 CONCLUSIONS OF LAW

24 I

25 Appellant contends that the order of cancellation is void because
26 respondent failed to give it a second opportunity to show cause why the

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 permit should not be cancelled. See RCW 90.03.320¹ and WAC 173-136-060².

2
3 1. RCW 90.03.320 APPROPRIATION PROCEDURE--CONSTRUCTION
4 WORK. Actual construction work shall be commenced on
5 any project for which permit has been granted within
6 such reasonable time as shall be prescribed by the
7 supervisor of water resources, and shall thereafter
8 be prosecuted with diligence and completed within
9 the time prescribed by the supervisor. The super-
10 visor, in fixing the time for the commencement of
11 the work, or for the completion thereof and the
12 application of the water to the beneficial use
13 prescribed in the permit, shall take into consideration
14 the cost and magnitude of the project and the
15 engineering and physical features to be encountered,
16 and shall allow such time as shall be reasonable
17 and just under the conditions then existing, having
due regard for the public welfare and public in-
terests affected: and, for good cause shown, he
shall extend the time or times fixed as aforesaid,
and shall grant such further period or periods as
may be reasonably necessary, having due regard to
the good faith of the applicant and the public
interests affected. If the terms of the permit or
extension thereof, are not complied with the
supervisor shall give notice by registered mail
that such permit will be canceled unless the
holders thereof shall show cause within sixty
days why the same should not be so canceled.
If cause be not shown, said permit shall be
canceled.

18 2. WAC 173-136-060 PERMITS--PRIORITIES AND CONDITIONS
19 OF RIGHT OF WITHDRAWAL. Every permit issued pursuant to
20 this chapter shall be:

21 (1) Conditioned to insure the protection of public
22 interest and values and of the rights of withdrawal and
23 use established in public waters artificially stored ground
24 waters both prior and subsequent to the issuance of such a
permit.

25 (2) Conditioned to comply with the provisions of the
26 chapter of the Washington Administrative Code containing
27 the water management and regulation regulations for the
28 specific ground-water area, subarea, or zone to which the
application relates.

29 (3) Conditioned to provide for inspection, monitoring,
30 entry, and reporting of data by or to the department and the
holder of an accepted declaration as required by the department.

31 (4) Conditioned to provide that a permit shall be subject

1 The evidence discloses that appellant received a "show cause"
2 letter dated March 13, 1978, a letter of extension dated June 2, 1978
3 and an order of cancellation dated October 10, 1978. From this
4 it is evident that respondent complied with the statutory, regulatory
5 and permit provisions prior to cancelling the instant permit. There
6 was no "order" which modified the terms of the permit. Thus, the
7 show cause letter dated March 13 constituted compliance with the
8 method chosen by respondent to cancel the permit. The letter from
9 respondent dated June 2, 1978 purporting to extend the permit was
10 not an appealable order or an order which formally modified the
11 permit. See Deking v. DOE, PCHB No. 874. Thus, there was no
12 necessity for a second show cause letter to be sent. Even if the
13 letter of extension could be deemed to be an order which modified the
14 permit, there is nothing to show that appellant was prejudicially misled
15 by the procedures used.

16 II

17 Appellant has not shown good cause why the permit should not
18 be cancelled. Development in the NW 1/4 of Section 1 has remained
19

20 Cont.

21 to termination or modification for failure to comply with any
22 agreement, approved by the department, between the permittee
and the holder of a declaration accepted by the department of
ecology pursuant to RCW 90.44.130.

23 (5) Subject to termination or modification, through
24 issuance of supplemental orders of the department, for
good cause, including but not limited to:

- 25 (a) Violation of a permit condition;
- (b) Obtaining a permit by misrepresentation or
failure to fully disclose all relevant facts;
- 26 (c) The receipt of new facts or information dictate
27 the same.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

essentially static since 1975 and 1976 when the pipeline and circle were installed and the ground was chisel plowed. Appellant was aware that water was not available in the quantity desired for the N 1/2 section in the spring of 1976. Rather than use the water for lower-duty crops in the N 1/2, appellant diverted water from the NW 1/4 to the SE 1/4 of Section 1. This was a conscious choice by appellant. It does not show good cause why permit QB 174A should not be cancelled as to the NW 1/4 section.

Appellant's drilling for water in the NW 1/4 was done without a permit and can form no basis to show good cause why permit QB 174A, which does not provide for a well in the NW 1/4, should not be cancelled. Nor does such drilling justify reversing the Department so that appellant's application for change in water right might be processed. In summary, the entire events and circumstances do not justify reversing the Department on the basis of good cause shown.

III

The permit development schedule requires that "complete application of water" is to be made by March 11, 1978. Provision 11 requires that the permittee "shall apply the water to beneficial use" presumably by the completion date of the development schedule or any extensions granted thereto for good cause shown. Under the framework developed by respondent for management of artificially stored ground water in this area, a permittee must actually apply water to the intended beneficial use to retain a permit. In other words, a permittee must actually appropriate water. The evidence shows that appellant did not actually apply water to irrigation within the time set forth in the permit

1 or letter. Moreover, appellant's evidence shows that water could
2 have been applied on the NW 1/4 section in 1976. Through its own
3 choice, the NW 1/4 was not irrigated although it might have been
4 for a crop which required less water. If appellant was not aware of
5 the requirements in the permit, it should have been.

6 IV

7 The Department of Ecology order cancelling permit QB 174A should
8 be affirmed.

9 V

10 Any Finding of Fact which should be deemed a Conclusion of Law
11 is hereby adopted as such.

12 From these Conclusions the Board enters this

13 ORDER

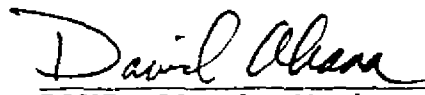
14 Department of Ecology Order of Cancellation of Ground Water
15 Permit No. G3-21892 (QB 174A) is affirmed.

16 DATED this 6TH day of APRIL, 1979.

17 POLLUTION CONTROL HEARINGS BOARD

18 
19 DAVE J. MOONEY, Chairman

20
21 CHRIS SMITH, Member

22 
23 DAVID AKANA, Member

24
25
26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER